

113 FERC ¶ 61,268
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Birch Power Company	Project Nos. 12597-001 12598-001
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Wade Jacobsen	Project No. 12599-001
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ORDER DENYING REHEARING

(Issued December 15, 2005)

1. On July 28, 2005, the Director, Division of Hydropower Licensing (Director), issued letter orders rejecting the exemption applications filed by Birch Power Company (Birch Power) for the Lower and Upper Turnbull Drops Project Nos. 12597 and 12598, respectively, and by Wade Jacobsen for the Mill Coulee Drops Project No. 12599. The projects are proposed to be located on the Spring Valley and Mill Coulee Canals in Teton County, Montana. The applications were rejected because the projects do not meet the statutory requirements for an exemption in that they do not use either the water power potential of a natural water feature or of an existing dam. On August 24, 2005, Birch Power and Wade Jacobsen, jointly, filed a request for rehearing of the Director's orders.¹ We conclude that the Director's findings were correct and we therefore deny rehearing.

Background

2. On June 24, 2005, Birch Power and Wade Jacobsen filed exemption applications for the three projects. The Spring Valley Canal and the Mill Coulee Canal, on which the projects are proposed to be located, are part of the U.S. Bureau of Reclamation's Sun River Irrigation Project. The irrigation project comprises three dams and storage reservoirs, two diversion structures, 131 miles of canals, and over 800 miles of laterals

¹ The rehearing request was filed by Nicholas Josten, authorized agent for both.

and drains. Sun River flows are stored in the reservoir behind the Gibson Dam (the irrigation project's most upstream facility) and are released into the river for diversion three miles downstream at the Sun River Diversion structure into a 12-mile-long canal. Water from the supply canal is stored at the Pishkun reservoir (an offstream storage reservoir) and released into the Sun River Slope and Spring Valley Canals, which serve the canals and laterals of the Sun River Project's Greenfield Division. The proposed projects would use the Greenfield Division flows.

3. The projects would be located at three drop structures on the canals, each of which is a reinforced concrete section of the canal that carries water down a steep gradient. For each project, water would be diverted from the canal above the drop structure into a penstock that would carry the water to a turbine in the powerhouse. After passing through the turbine, the water would be returned to the canal below the drop structure.

4. On July 28, 2005, the Director rejected the three exemption applications. The Director concluded that the three projects did not qualify as exemptions because they would not use the water power potential of a natural water feature or of an existing dam. On August 24, 2005, Birch Power and Wade Jacobsen filed a request for rehearing of the Director's orders, arguing that the projects would use a natural water feature to generate power. They do not dispute the finding that the projects would not use an existing dam.

Discussion

5. The Commission is authorized to exempt from the licensing requirements of Part I of the Federal Power Act (FPA) small hydroelectric projects with an installed capacity of 5 MW or less that use for the generation of electricity either an existing dam (*i.e.*, one in existence on or before April 20, 1977) or a "natural water feature" without the need for any dam or impoundment.²

6. As pertinent here, the Commission's regulations define a "small hydroelectric power project" as one that will have a total installed capacity of not more than 5 megawatts and will use "for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream without the need for a dam or man-made impoundment..."³

² See section 408 of the Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611, amending sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708 (2000).

³ 18 C.F.R. § 4.30(b)(29) (2005).

7. On rehearing, applicants argue that the exemption applications should not have been rejected because each of the proposed projects would use the hydropower potential of a natural water feature, in that they will use the gradient of a natural stream, the Sun River. They state that water is diverted from the Sun River at an elevation of 4,480 feet and is then transported through a series of canals to an elevation of 4,323 feet at a point just above the first of the canal drop structures where the generating facilities are to be constructed. The confluence of Muddy Creek and the Sun River is at elevation 3,360 feet. Applicants argue that the three projects use the hydropower potential of the natural gradient of the Sun River between the point of diversion from the Sun River at elevation 4,480 feet and the point of return to the Sun River at elevation 3,360 feet.

8. None of these projects would utilize the gradient of a natural stream. The projects would be located at reinforced concrete drop structures that are part of an extensive man-made system of irrigation canals. Over 35 miles of canals separate the Upper and Lower Turnbull Drops from the dam that diverts water from the Sun River. The Mill Coulee Drops are over 45 miles from the point of diversion. Thus, the projects would use the canals and drop structures that carry water for irrigation. As we have explained in the past, neither Congress nor the Commission intended such structures to be included in the definition of “natural water features.”⁴ Rather, these canals and drop structures can be said to use at most the gradient of the land.⁵ For the above reasons, we deny the request for rehearing and affirm the Director’s rejection of the applications.⁶

⁴ See *Big Bear Regional Wastewater Agency*, 27 FERC ¶ 61,100 (1984).

⁵ *Id.* at n. 8.

⁶ These projects do not qualify for small conduit exemptions under section 30(c) of the FPA because they would be located on federal land. See 16 U.S.C. § 823(a)(2000), and 18 C.F.R. § 4.30(b)(28) (2005).

The Commission orders:

The August 24, 2005, request for rehearing of the Director's orders of July 28, 2005, rejecting the applications for the Lower Turnbull Drop Project No. 12597, the Upper Turnbull Drop Project No. 12598, and the Mill Coulee Drops Project No. 12599 is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.